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No. 06-219

In The
Supreme Court of the United States

CHARLES WILKIE, *et al.*,

Petitioners,

v.

HARVEY FRANK ROBBINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amicus Curiae Mountain States Legal Foundation will address the following Question Presented:

> Whether the Fifth Amendment protects against retaliation for exercising a "right to exclude" the government from one's property outside the eminent domain process and, if so, whether that Fifth Amendment right was clearly established.

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AMICUS CURIAE BRIEF

Mountain States Legal Foundation respectfully submits this *amicus curiae* brief in support of Respondent. Pursuant to Supreme Court Rule 37(3)(a) this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. Since its creation in 1977, MSLF has represented parties before this Court seeking to preserve the Constitution's equal protection guarantees, *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), and has participated as an *amicus curiae* to ensure that the Fifth Amendment is properly interpreted so as to preserve private property rights. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), *amicus curiae* represents that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus curiae* and its members, made a monetary contribution for the preparation or submission of this brief.

More importantly, as it relates to the instant case, the majority of MSLF's 13,000 members own property and/or operate businesses in the western United States. Many of these members own real property that is adjacent to, or surrounded by, federal lands. Many of MSLF members are also actively engaged in livestock, oil and gas, mining, and timber operations on federal lands – these businesses are the cornerstones of western rural economies and form the foundation for the way of life in the West. Because MSLF's members have to deal with employees of the federal land management agencies on a daily basis, they are extremely concerned about the potential for abuse if Petitioners' theories are adopted by this Court. Indeed, if Petitioners' theories are adopted, employees of federal land management agencies will be able to eviscerate the property rights of MSLF's members with relative impunity.

STATEMENT OF THE CASE

Petitioners are seeking review of an interlocutory decision by the Tenth Circuit that affirmed the District Court's denial of Petitioners' motion for summary judgment. Pet. App. at 26a. The District Court ruled that Respondent had submitted sufficient evidence to support his allegations that Petitioners retaliated against him for exercising his right to exclude. Pet. App. 37a-39a, 46a-47a. On appeal, the Tenth Circuit agreed that Petitioners were not entitled to qualified immunity, at the summary judgment stage, as to Respondents' Fifth Amendment *Bivens* claim. Pet. App. 10a-16a. In so doing, the Tenth Circuit recognized that the "right to exclude the government from one's private property" is "'a fundamental element of the property right.'" *Id.* at 12a (quoting *Kaiser Aetna v. United*

States, 444 U.S. 164, 178-80 (1979)). The Tenth Circuit then concluded: "[i]f the right to exclude means anything, it must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause." *Id.* at 13a. Thus, the Tenth Circuit held that Respondent has a Fifth Amendment right to prevent the government from taking his property when the government is not exercising its eminent domain power. *Id.* at 14a-15a. Finally, the Tenth Circuit concluded there was sufficient evidence that Petitioners' retaliatory actions violated the clearly established right to exclude. *Id.* at 15a-16a.

SUMMARY OF ARGUMENT

The issue here is whether employees of the Bureau of Land Management ("BLM") should have known that it was improper to retaliate against a property owner, through a campaign of threats, harassment, and intimidation, in an attempt to coerce him into relinquishing his right to exclude the government from his private property. The Framers of the Constitution recognized that private property is essential to a free society. By safeguarding private property, the Framers believed that all other individual liberties would be protected.

The right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Property owners may assert the right to exclude against friends and strangers, and, most importantly, against the government. This right is so well established that every schoolchild knows of its existence. In fact, it would seem that "Keep Out – Private Property"

has been scratched, scribbled, or otherwise affixed upon the bedroom door, tree house, or "secret hideaway" of nearly every child in America.

It is just as well established that the government may not retaliate against its citizens for exercising their legal rights. This prohibition against retaliation applies to rights protected by the Sixth Amendment, the First Amendment, and, most importantly, the Fifth Amendment. It simply stretches credulity for Petitioners to come before this Court and suggest that they were unaware that they could not retaliate against Respondent for exercising his right to exclude the government from his property.

ARGUMENT

I. THE RIGHT TO EXCLUDE THE GOVERNMENT FROM ONE'S PROPERTY IS WELL ESTABLISHED.

A. Private Property Protects All Individual Liberties.

The origin of property rights in America may be traced to the *Magna Carta* (1215). *See, United States. v. Lee*, 106 U.S. 196, 228 (1882). Chapter 39 of the *Magna Carta* provides: "[n]o freeman shall be taken or imprisoned, or disseised . . . unless by the lawful judgment of his peers, or by the law of the land." Thus, the *Magna Carta* secured the rights of property owners against deprivations by the government without due process of law. James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 13 (2d ed. 1998) (hereinafter "*The Guardian of Every Other Right*"). Importantly, the early American colonists believed the *Magna Carta* to be

part of their birthright as English subjects. *Id.* For example, in 1687, William Penn advised the colonists "not to give away any thing of *Liberty* and *Property* that at present they do . . . enjoy." *Id.* (quoting William Penn, *The Excellent Privilege of Liberty and Property Being the Birth-Right of the Free-Born Subjects of England* (Philadelphia, William Bradford 1687)) (emphasis in original).

In 1690, John Locke published his famous *Second Treatise of Government*, in which he contended that legitimate government was based on a compact whereby people gave their allegiance to the government in exchange for protection of their property rights. John Locke, *Second Treatise of Government*, §§ 123-131 (C. B. Macpherson ed., 1980) (1690). According to Locke:

> [P]rivate property existed under natural law before the creation of political authority. Indeed, the principal purpose of government was to protect these natural property rights, which Locke fused with liberty. . . . Because the ownership of property was a natural right, the powers of government were necessarily limited by its duty to safeguard property.

The Guardian of Every Other Right, at 17. Evidently influenced by Locke, "colonial leaders viewed the security of property as the principal function of government." *Id.* at 28. In fact, Thomas Jefferson incorporated the compact theory of Locke into the *Declaration of Independence*. *Id.* at 29.

The Framers of the Constitution also recognized that "principles of good government started with the protection of private property – that guardian of all other rights." Richard A. Epstein, *The Ebbs and Flows in Takings Law:*

Reflections on the Lake Tahoe Case, 2002 Cato Sup. Ct. Rev. 5 (2002). For example, utilizing the philosophy of Locke, John Rutledge of South Carolina told the delegates at the Philadelphia Convention that "[p]roperty was certainly the principal object of Society." *The Guardian of Every Other Right,* at 43 (quoting 1 *The Records of the Federal Convention of 1787,* at 534 (Max Farrand ed. 1937)). Alexander Hamilton stated: "One great objt. of Govt. is personal protection and the security of Property." *Id.* (quoting 1 *The Records of the Federal Convention of 1787,* at 302). Thus, the Framers saw "property ownership as a buffer protecting individuals from government coercion." *Id.*

In 1790, John Adams proclaimed: "[p]roperty must be secured or liberty cannot exist." *Id.* (quoting *Discourses on Davila, in* 6 *The Works of John Adams,* 280 (Charles Francis Adams ed. 1851)). The next year, the Fifth Amendment became effective and expressly incorporated into the Constitution Adams' belief that property is fundamental to liberty. As finally adopted:

> [T]he Fifth Amendment contains two important property guarantees, along with procedural safeguards governing criminal trials. The amendment provides in part that no person shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Madison's decision to place this language next to criminal justice protections, such as the prohibitions against double jeopardy and self-incrimination, underscored the close association of property rights with personal liberty. *Individuals needed security against both arbitrary punishment and deprivation of property.*

The Guardian of Every Other Right, at 54 (emphasis added).

For over 200 years this Court has consistently recognized that private property is essential to a free society. In 1897, for example, Justice John M. Harlan declared:

> Due protection of the rights of property has been regarded as a vital principle of republican institutions. "Next in degree to the right of personal liberty . . . is that of enjoying private property without undue interference or molestation." The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. *Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citzen* [sic]."

Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226, 235-236 (1897) (citations omitted) (emphasis added). Seventy-five years later, this Court again emphasized that private property was an essential component to liberty:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to

> liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) (citations omitted).

Accordingly, "[t]he right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty." *The Guardian of Every Other Right,* at 26 (quoting Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America* at 14 (New York 1775)).

B. The Right To Exclude Is The "Essential Stick" In The Bundle Of Rights That Comprise Property.

The term "property" in the Fifth Amendment is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). Instead, the term includes the entire "group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *Id.* In accordance with this interpretation, this Court has held that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna*, 444 U.S. at 176; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994). Indeed, as Justice Brandeis explained: "[a]n essential element of individual property is the legal right to exclude others from enjoying it." *International News Service v.*

Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). That the right to exclude is "one of the most treasured strands in [a property] owner's bundle of rights[,]" *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), is based upon the simple principle that without the right to exclude, private property would not exist. Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730 (1998). Thus, the right to exclude may not only be the "essential stick" in the bundle of rights that comprise property, it may be the "*sine qua non*" of property. *Id.*

This conclusion is fully supported by Wyoming law. *See, Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (Property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source" such as state law). Ownership of property in Wyoming includes the right to defend that property. *Cross v. State*, 370 P.2d 371, 376-377 (Wyo. 1962) (the right to defend one's property is guaranteed under Wyoming's Constitution). The right to defend one's property has long been recognized at common law and is deeply rooted in the legal traditions of this Nation. *Christy v. Lujan*, 490 U.S. 1114 (1989) (White, J., dissenting from denial of *certiorari*). Because a person in Wyoming has the right to defend his property, that person has a concomitant right to exclude. *Sammons v. American Automobile Ass'n*, 912 P.2d 1103, 1105 (Wyo. 1996) (Ownership of property in Wyoming "includes the right to exclude others; that is, a true owner of land exercises full dominion and control over the land and possesses the right to expel trespassers."); *Mayland v. Flitner*, 28 P.2d 838, 848 (Wyo. 2001).

C. The Right To Exclude Applies Against The Government.

The right to exclude is well established in the history of this Nation and, in particular Wyoming. This right allows a property owner to exclude friends, strangers, and, especially, the government.[2] *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991); *United States v. Kara*, 468 U.S. 705, 729 (1984) (Stevens, J., concurring) ("The owner of property, of course, has a right to exclude from it all the world, including the government, and a concomitant right to use it exclusively for his own purposes."); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* at 63-66 (1985). In fact, those legitimate expectations of privacy that receive Fourth Amendment protection against governmental searches and seizures are based, in part upon a person's fundamental right to exclude the government from his property. *Rakas v. Illinois*, 439 U.S. 128, 143, n.12 (1978). Thus, if the right to exclude is to have any meaning, this Court must stringently apply it against the government:

> The intruder who enters clothed in the robes of authority in broad daylight commits no less an

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[2] The only case that has suggested that the right to exclude is not absolute is *PruneYard Shopping Center v. Robins*, 47 U.S. 74 (1980). In that case, this Court upheld a state constitutional provision that prohibited owners of shopping centers from excluding individuals who wished to exercise their First Amendment rights on shopping center property. *Id.* at 82-85. This Court later explained that the basis of this holding was that "the owner had not exhibited an interest in excluding all persons from his property." *Loretto*, 458 U.S. at 434. Thus, at most, *PruneYard* should be construed as an attempt by this Court to resolve a conflict that arose after the owner had previously waived his right to exclude. *See*, Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. at 735, n.16.

> invasion of these rights than if he sneaks in in the night wearing a burglar's mask. *In some ways, entry by the authorities is more to be feared, since the citizen's right to defend against the intrusion may seem less clear. Courts should leave no doubt as to whose side the law stands upon.*

Hendler, 952 F.2d at 1377 (emphasis added).

II. GOVERNMENT RETALIATION AGAINST THE EXERCISE OF THE RIGHT TO EXCLUDE IS PATENTLY UNCONSTITUTIONAL.

A. The Prohibition Against Government Retaliation Is Well Established.

It is well established that the government may not retaliate against a person for exercising a legal right. *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1977) ("[F]or an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'") (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 32-33, n.20 (1973)); *see also, Shapiro v. Thompson*, 394 U.S. 618, 631 (1969), *overruled in part on other grounds*, *Edelman v. Jordan*, 415 U.S. 651, 670-671 (1974). Although this protection against governmental retaliation is not expressly referred to in any Constitutional provision, it exists nonetheless because retaliation inhibits or chills the exercise of legal rights. *See, Pickering v. Board of Education of Township High School*, 391 U.S. 563, 574 (1968).

B. The Prohibition Against Government Retaliation Applies To All Rights.

Although Petitioners concede that individuals have a right against government retaliation, they curiously argue that the anti-retaliation doctrine protects only First Amendment rights. Brief for the Petitioners at 37 ("This Court's constitutional retaliation doctrine is limited to suits alleging retaliation for the exercise of *First* Amendment rights.") (emphasis in original). Granted, most retaliation cases arise in the First Amendment context. *See, e.g., Hartman v. Moore*, ___ U.S. ___, 126 S.Ct. 1695, 1701 (2006); *Myers v. Connick*, 461 U.S. 138, 142 (1983); *Pickering*, 391 U.S. at 574. However, contrary to the argument of Petitioners, the anti-retaliation doctrine is not limited to First Amendment rights. Instead, the doctrine applies to all rights.

In *United States v Jackson*, 390 U.S. 570 (1968), this Court held unconstitutional the capital punishment provision of the Federal Kidnapping Act. This provision allowed the death sentence to be imposed only if the jury recommended such a sentence. *Id.* at 570-571. If the defendant pled guilty or waived his right to a jury trial, however, the death sentence could not be imposed. *Id.* The defendants argued that this provision was unconstitutional because, by allowing only a jury to impose the death sentence, it "discourage[d]" or "chill[ed]" the exercise of their Sixth Amendment right to a jury trial. *Id.* at 581. In short, the defendants argued they could either exercise their Sixth Amendment right and risk a death sentence or relinquish their Sixth Amendment right and avoid that risk. *Id.*

The government defended the provision by arguing it "ameliorat[ed] the severity of the more extreme punishment that Congress might have wished to provide[,]" *i.e.*, a mandatory death sentences in every case. *Id.* at 581-582. This Court easily rejected that argument:

> [W]hatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. . . . Congress can of course mitigate the severity of capital punishment. The goal of limiting the death penalty to cases in which a jury recommends it is an entirely legitimate one. But that goal can be achieved without penalizing those defendants who plead not guilty and demand [a] jury trial. . . . Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnapping Act, *Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right.*

Id. at 582-583 (internal citations and footnotes omitted) (emphasis added).

The next year, this Court was faced with the issue of whether a criminal defendant could be subjected to a greater punishment after a successful appeal and then a conviction after retrial. *North Carolina v. Pearce*, 395 U.S. 711 (1969). Although this Court concluded that such a harsher sentence was not absolutely precluded by the Constitution's protection against double jeopardy or its guarantee of equal protection, it emphasized that retaliatory "imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be . . . a violation of due process of law." *Id.* at 724. Specifically, this Court ruled:

> Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

Id. at 725. In order to assure the absence of a retaliatory motivation, this Court concluded:

> [W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear [in the record]. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

Id. at 726. By imposing this duty, this Court sought to prevent retaliation by trial judges against criminal defendants who exercised their appeal rights.

Five years later, this Court extended the anti-retaliation principles in *Pearce* to prosecutors. In *Blackledge v. Perry*, 417 U.S. 21, 22 (1974), the defendant was convicted of assault in an inferior court having exclusive jurisdiction over misdemeanors. The court imposed a six-month sentence. *Id.* Under North Carolina law, the defendant had an absolute right to a trial *de novo* in the superior court, which possessed jurisdiction over felonies. *Id.* After the defendant filed his notice of appeal, the prosecutor then obtained a felony indictment charging him with

assault with a deadly weapon. *Id.* at 23. This indictment covered the same conduct for which the defendant had been tried and convicted in the inferior court. *Id.* Subsequently, the defendant pleaded guilty to the felony and was sentenced to a term of five to seven years in prison. *Id.*

In reviewing the defendant's felony conviction and increased sentence, this Court stated that the essence of the holding in *Pearce* was that the Constitution's guarantee of due process of law is not offended by all increases in punishment upon retrial after a successful appeal. *Id.* at 27. Instead, due process of law is only offended by those increases in punishment that may have been the product of "vindictiveness" against a defendant for exercising his rights. *Id.* Because a prosecutor in the North Carolina system would have "a considerable stake in discouraging convicted misdemeanants from appealing" in light of the increased expenditures involved in a trial *de novo*, this Court held that prosecutors could not bring more serious charges against defendants who exercise their statutory right to appeal. *Id.* at 27-29.

Accordingly, the decisions in *Jackson, Pearce,* and *Blackledge* reflect a recognition by this Court of the simple proposition that the government may not "punish a person because he has done what the law plainly allows him to do. . . ." *Bordenkircher*, 434 U.S. at 362. This prohibition against government retaliation applies whether a person is exercising a constitutional or statutory right. *United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("[W]hile an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right."). Thus, Petitioners' argument that the prohibition against government

retaliation applies only to First Amendment rights is simply wrong.

C. The Fifth Amendment Prohibits The Government From Retaliating Against The Exercise Of The Right to Exclude.

Petitioners concede that Respondent has a right to exclude the government from his property. Brief for the Petitioners at 41 ("It is common ground that individuals possess a 'right to exclude' others – including the government – from their property."). Under this Court's anti-retaliation doctrine, it is "patently unconstitutional" for government agents to retaliate against a person for exercising a legal right. *Chaffin*, 412 U.S. at 32-33, n.20; *Goodwin*, 457 U.S. at 373. The District Court ruled that Respondent had submitted sufficient evidence, at the summary judgment stage, to support his allegations that Petitioners retaliated against him for exercising, what Petitioners concede is, a well-established right. Pet. App. 37a-39a, 46a-47a. This ruling was not disturbed by the Tenth Circuit, Pet. App. 10a-12a, and Petitioners are not challenging that result. *See* Brief for the Petitioners at I. These factors, in and of themselves, prove that Respondent should have the opportunity to prove his *Bivens* claim at trial.

In an effort to avoid this obvious result, Petitioners argue that the Fifth Amendment does not protect against government retaliation for the exercise of property rights. Brief for the Petitioners at 37. Instead, Petitioners argue that the Fifth Amendment guarantees only the payment of just compensation upon the taking of property. *Id.* at 41. Because the Fifth Amendment guarantees only the payment of just compensation upon the taking of property,

Petitioners contend that Respondent's sole remedy for the alleged Fifth Amendment violation is to seek just compensation under the Tucker Act, 28 U.S.C. § 1491, "once a taking has occurred." Brief for the Petitioners at 37-43. In short, Petitioners contend that there will be no Fifth Amendment violation until they succeed in acquiring an ownership interest in Respondent's property and refuse to pay just compensation. *Id.* at 43.

The flaws with Petitioners' argument are numerous. First, if Petitioners succeed in extorting an easement across Respondent's property, the United States would argue, in any subsequent Tucker Act case, that there was no taking. *See, Norman v. United States*, 429 F.3d 1081, 1087-1089 (Fed. Cir. 2005) (voluntary transfer of title precludes takings claim). Thus, under Petitioners' interpretation, the Fifth Amendment neither protects a property owner from governmental attempts to extort an ownership interest in the property nor provides a remedy if the government is successful in extorting that interest. The Framers of the Constitution would be shocked to know this is how the government they created treats its citizens.

Second, Petitioners' argument confuses the issue because it focuses exclusively on the Takings Clause of the Fifth Amendment. Petitioners concede that Respondent's *Bivens* claim is brought under the Fifth Amendment. Brief for the Petitioners at 41 (Respondent's "*Bivens*-based retaliation claim is predicated entirely on the Fifth Amendment."); *id.* at 34 ("[R]espondent's complaint states only a single *Bivens* claim predicated on an alleged violation of the Fifth Amendment.") (citing Joint App. 78-79). The Fifth Amendment, of course, includes both the Due Process Clause and the Takings Clause. The Due Process

Clause certainly protects Respondent from retaliation by Petitioners for exercising his right to exclude. *See Pearce*, 395 U.S. at 725 ("Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial."); *Blackledge*, 417 U.S. at 27-29 (principles of due process are offended when prosecutors retaliate against defendants who exercise their statutory rights to appeal).

Finally, even if the Due Process Clause is removed from the equation, the Takings Clause, in and of itself, protects against governmental retaliation for exercising property rights, including the right to exclude. *See Dolan*, 512 U.S. at 392 (There is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as [other Amendments], should be relegated to the status of a poor relation. . . ."). Indeed, "[t]he reason why . . . retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right." *Crawford-El v. Britton*, 523 U.S. 574, 589, n.10 (1998) (citing *Pickering*, 391 U.S. at 574). Thus, "[r]etaliation is . . . akin to an 'unconstitutional condition' demanded for the receipt of a government-provided benefit." *Id.* (citing *Perry v. Sinderman*, 408 U.S. 593, 597 (1972)). In *Sinderman*, a teacher in the Texas state college system alleged that the State declined to renew his contract in retaliation for statements he made that were critical of the Board of Regents. 408 U.S. at 594-595. This Court held that, if the teacher's allegations were true, the State's retaliatory action would be unconstitutional under the doctrine of "unconstitutional conditions":

> [E]ven though a person has no "right" to a valuable governmental benefit and even though the

> government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

Id. at 597-598.

Although *Sinderman* is a First Amendment case, this Court has frequently used the doctrine of "unconstitutional conditions" in its Takings Clause jurisprudence. *See Dolan*, 512 U.S. at 385. For example, in *Nollan*, 483 U.S. at 836-837, the California Coastal Commission sought to condition the issuance of a building permit on the property owners granting a public easement across their land. In effect, the Commission wanted the property owners to relinquish their fundamental right to exclude, *id.* at 831-832, in exchange for exercising another fundamental property right – the right to build. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992) (indicating that the right to build habitable structures on land is an "essential use" of land). Because there was no "essential nexus" between the easement demanded and the permit requested, the Commission's demand that the property owners relinquish their fundamental right to exclude in exchange for a building permit was "an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837 (quoting *E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981), *overruled on other grounds*, *Town of Auburn v. McEvoy*, 533 A.2d 317, 320-321 (N.H. 1988)). If the Takings Clause, as made applicable to the States through the

Fourteenth Amendment, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980), barred the California Coastal Commission's attempt to extort the right to exclude in *Nollan*, *a fortiori*, the Takings Clause bars Petitioners from retaliating against Respondent for exercising that same right.

CONCLUSION

The Framers believed that private property is an indispensable component of a free society. The right to exclude is the "essential stick" in the bundle of rights that comprise private property. Petitioners pay "lip-service" to the right to exclude by contending that government employees may retaliate against the exercise of that right with impunity. This Court must reject Petitioners' attempt to further relegate property rights below other constitutional rights by affirming the decision of the Tenth Circuit and, thereby, allowing Respondent an opportunity to prove his *Bivens* claim at trial.

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